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What does the *Foxx* say? An Analysis on the Potential Impact of the EEOC's Official Position that Discrimination on the Basis of Sexual Orientation is itself a Form of Sex Discrimination

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NOTE

What does the *Foxx* say? An Analysis on the Potential Impact of the EEOC's Official Position that Discrimination on the Basis of Sexual Orientation is itself a Form of Sex Discrimination

Elizabeth Halet*

INTRODUCTION

The lesbian, gay, bisexual, and transgender (LGBT) community in the United States has attained a level of social recognition and legal status during the last fifty years¹ that, when compared to other civil rights movements, has come at a pace that is arguably unprecedented in documented world history.² The landmark marriage equality case of 2015,³ while paradigm-shattering in its implications for the recognition of thousands of LGBT families as deserving of “equal dignity in the eyes of the law,”⁴ falls far short of legally protecting LGBT individuals outside the sphere of marriage from other forms of discrimination that could impact their safety, their family, and their way of life.⁵

As the joyous tidal wave of marriage equality slowly—and turbulently—⁶ recedes into accepted legal discourse, the next logical frontier for the LGBT community will be obtaining federal anti-discrimination protection in employment.⁷ Workplace protections (or lack thereof) affect far more people and constitute a far

* Articles Editor, Indiana Journal of Law & Social Equality; J.D. Class of 2017, Indiana University Maurer School of Law.

1 David Crary, *In 50 Years, Huge Strides for Gay Rights Movement*, ASSOCIATED PRESS (June 8, 2013), <http://action.pacompetes.org/news/entry/in-50-years-huge-strides-for-gay-rights-movement> (discussing three of the gay-rights movement's pivotal phases and the move from homosexuality being a mental disorder and gay sex being a crime to marriage equality).

2 Chris Johnson, *Clinton: LGBT advocacy 'fastest civil rights movement' in world's history*, WASHINGTON BLADE (Nov. 8, 2015, 2:52 PM), <http://www.washingtonblade.com/2015/11/08/clinton-lgbt-advocacy-fastest-civil-rights-movement-in-worlds-history/#sthash.iZ2B3g1d.dpuf>.

3 *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015).

4 *Id.* at 2608.

5 *The Need for Full Federal LGBT Equality*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/fullfederaequality/> (last visited Nov. 3, 2015).

6 Most of the “turbulence” is the recalcitrance of Christian groups. See Barna Groups, *Christians React to the Legalization of Same-Sex Marriage: 9 Key Findings*, (July 1, 2015), <https://www.barna.com/research/christians-react-to-the-legalization-of-same-sex-marriage-9-key-findings/> (includes survey that indicates that 94% of theologically-defined evangelical Christians strongly oppose same-sex marriage); Tamara Audi & Jacob Gershman, *Religious Groups Vow to Fight Gay Marriage Despite Supreme Court*, WALL STREET JOURNAL, (updated June 26, 2015, 7:51 PM), <https://www.wsj.com/articles/religious-groups-vow-to-fight-same-sex-marriage-despite-supreme-court-1435329751>.

7 Rebecca Nelson, *The Next Frontier of the Gay-Rights Movement*, NATIONAL JOURNAL (Nov. 12, 2015), <http://www.nationaljournal.com/s/92350/next-frontier-gay-rights-movement?mref=mostread>; *After Marriage Equality, What's Next For The LGBT Movement?*, NPR (June 29, 2015, 2:30 PM), <http://www.npr.org/2015/06/28/418327652/after-marriage-equality-whats-next-for-the-lgbt-movement>; Jennifer Calfas, *Employment discrimination: The next frontier for LGBT community*, USA TODAY (Aug. 1, 2015, 7:49 AM), <http://www.usatoday.com/story/news/nation/2015/07/31/employment-discrimination-lgbt-community-next-frontier/29635379/>.

more important objective for many gay individuals than marriage equality.⁸ An overwhelming majority of Americans believe that there are already federal protections in place for LGBT individuals.⁹ This belief is erroneous and in stark contrast with recent reports documenting instances of workplace discrimination¹⁰ and the staggering amount of media attention given to high profile discrimination-based firings of LGBT employees in recent years.¹¹ The gravity of the harm perpetuated by the lack of federal non-discrimination protection is absorbed not only by the individuals involved in instances of alleged workplace discrimination, but also by the employers who are injured by placing the rights of its LGBT employees on a separate, lesser legal plane.¹² Unlike the marriage recognition context that limited businesses on a state-by-state basis, employers have it within their control to address workplace discrimination regardless of the level of state or local LGBT protections in place.¹³

There has been incremental progress in the movement toward extending some form of workplace protection to LGBT employees, but this tattered blanket of federal, state, and local protections has been slow to unfurl and its coverage is sporadic at best, leaving thousands of LGBT employees and their families unprotected in potentially precarious working situations.¹⁴ There are currently only twenty-one states that prohibit discrimination based on sexual orientation and only seventeen states and the District of Columbia that prohibit discrimination based on sexual

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- 8 *See generally* PEW RESEARCH CTR., A SURVEY OF LGBT AMERICANS: ATTITUDES, EXPERIENCES AND VALUES IN CHANGING TIMES 9 (2013) (internal quotation marks omitted), http://www.pewsocialtrends.org/files/2013/06/SDT_LGBT-Americans_06-2-13.pdf (outlining policy priorities within the gay community).
 - 9 Jeff Krehely, *Polls Show Huge Public Support for Gay and Transgender Workplace Protections*, CENTER FOR AMERICAN PROGRESS (June 2, 2011), <https://www.americanprogress.org/issues/lgbt/news/2011/06/02/9716/polls-show-huge-public-support-for-gay-and-transgender-workplace-protections/> (showing 9/10 Americans believe federal protections are in place).
 - 10 Jennifer Pizer et al., *Evidence of Persistent and Pervasive Workplace Discrimination Against LGBT People: The Need for Federal Legislation Prohibiting Discrimination and Providing for Equal Employment Benefits*, 45 LOY. L.A. L. REV. 715 (2012) (presenting discrimination data on gay workers).
 - 11 *See generally* Levi Pulkkinen, *Eastside Catholic vice principal ousted after gay marriage drops lawsuit*, SEATTLE POST-INTELLIGENCER (Nov. 28, 2014), <http://www.seattlepi.com/local/article/Vice-principal-ousted-for-Eastside-Catholic-after-5919802.php>; Tom Henry, *Sandusky teacher ousted for engaging his partner looks to move on*, TOLEDO BLADE (Jan. 14, 2014), <http://www.toledoblade.com/local/2014/01/14/Sandusky-teacher-ousted-for-engaging-his-partner-looks-to-move-on.html>; Mark Joseph Stern, *Gay Man Tormented at Work Then Fired for Being Gay Has No Legal Recourse, Court Rules*, SLATE (Oct. 30, 2015), http://www.slate.com/blogs/outward/2015/10/30/anti_gay_harassment_missouri_man_cannot_sue_for_sexual_orientation_discrimination.html.
 - 12 *See, e.g.*, Level Playing Field Inst., *The Corporate Leavers Survey: The Cost of Employee Turnover Due Solely to Unfairness in the Workplace*, (Jan. 7, 2007), www.lpfi.org/sites/default/files/corporate-leavers-survey.pdf.
 - 13 The choice to provide employee spousal benefits has always been at the discretion of private employers. *See Private Employment Issues and Benefits*, ACLU ET AL. (2013), https://cdn.americanprogress.org/wp-content/uploads/2013/06/Post-DOMA_PrivateEmployment_v2.pdf.
 - 14 Christy Mallory & Brad Sears, *Evidence of Employment Discrimination Based on Sexual Orientation and Gender Identity: An Analysis of Complaints Filed with State Enforcement Agencies, 2008-2014*, WILLIAMS INST. (2015), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Employment-Discrimination-Complaints-2008-2014.pdf>.

orientation *and* gender identity.¹⁵ Ultimately, approximately fifty percent of the American population resides in a place devoid of any explicit law that would protect them from being fired for his or her sexual orientation or gender identity.¹⁶

It is difficult for LGBT employees to get legal recourse for discrimination or harassment claims because they do not belong to a legally cognizable protected group. The government has failed to establish comprehensive, explicit federal workplace protection for LGBT workers for decades,¹⁷ resulting in reserved optimism over the anti-discrimination bill, S. Res. 1858, that was recently introduced in the Senate¹⁸ and H.R. 3185 that was introduced in the House of Representatives.¹⁹ LGBT employees suffering from discrimination have had some success bringing claims under the “sex” category of Title VII,²⁰ although the doctrine resulting from such cases is complex and arguably sustains harmful stereotypes about LGBT people.²¹ The potential keystone for direct legal recourse for LGBT employees that highlights sexuality could be found in the form of a recent decision from the Equal Opportunity Employment Commission (EEOC), which held that sexual orientation discrimination is *always* a form of sex discrimination.²² This decision’s interpretation of Title VII, if accepted by the Title III courts, would be monumental in firmly placing LGBT individuals under consideration for the “sex-based” protection of Title VII—thereby giving the opportunity to seek legal relief to people who had previously had their sexual orientation-related discrimination claims dismissed.

The anti-discrimination protections already available to millions of American workers may be promising, but the dignity of LGBT families will not be fully realized until there is some form of federal anti-discrimination protection in place to position them on equal legal footing as their heterosexual peers. Even though explicit and comprehensive anti-discrimination legislation would be monumental, an accepted interpretation of Title VII to include LGBT individuals under the “sex” provision would arguably provide broader and more immediate relief for LGBT workers and their families. Part I of this Note will give a brief overview of the current state of

15 HUMAN RIGHTS CAMPAIGN, THE COST OF THE CLOSET AND THE REWARDS OF INCLUSION 5 (2014), http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/Cost_of_the_Closet_May2014.pdf.

16 See HUMAN RIGHTS CAMPAIGN, *supra* note 5.

17 A History of Federal Non-Discrimination Legislation, HUMAN RIGHTS CAMPAIGN (2014), <http://www.hrc.org/resources/a-history-of-federal-non-discrimination-legislation>.

18 S. Res. 1858, 114th Cong. (2015); See also Mara Keisling, *The Equality Act Is the LGBT Rights Bill We Want and Need*, THE HUFFINGTON POST (July 22, 2015, 4:31 PM), http://www.huffingtonpost.com/mara-keisling/the-equality-act-is-the-l_b_7851266.html (“We all know that getting any legislation through a very polarized Congress is really hard right now. But we also know that the transgender and LGBT movements are stronger and better connected than ever. So, though we can't say that we see a clear pathway to pass the Equality Act through the current Congress, we know that the politics of LGBT equality are shifting in our favor.”).

19 H.R. Res. 3185, 114th Cong. (2015).

20 Title VII, 42 U.S.C. § 2000e.

21 Keith Cunningham-Parmeter, *Marriage Equality, Workplace Inequality: The Next Gay Rights Battle*, 67 FLA. L. REV. 1099 (2015) (explaining how courts have developed two exceptions to the general rule that a person’s sexual orientation is irrelevant to Title VII: the “effeminate victim exception” which validates claims brought by gay men if they can prove their effeminacy, and not their sexual orientation, caused their harassment; and the “predatory gay exception” which paints an image of a certain type of predatory, aggressive, and compulsive gay man).

22 Baldwin v. Foxx, EEOC Appeal No. 0120133080, 2015 WL 4397641 (EEOC July 15, 2015).

nondiscrimination protections for the LGBT community, Part II will identify and discuss how Title VII has been interpreted regarding LGBT discrimination claims, Part III will present the influence of *Macy v. Holder* and other recent EEOC actions, and Part IV will analyze the potential impact that *Baldwin v. Foxx* will have in the anti-discrimination arena.

I. CURRENT LEGAL LANDSCAPE FOR LGBT WORKERS

An LGBT individual with a potential discrimination claim can be placed at a significant disadvantage in accessing legal recourse simply because of his or her geographic location or whether the employer is in the public or private sector. In order to fully analyze the potential influence of the EEOC's new position on sexual orientation discrimination falling under Title VII, it is important to discuss the different contexts and the varying levels of legal protection LGBT employees are forced, oftentimes unknowingly, to navigate in the course of their daily lives.

A. Workplace

The portion of the LGBT community that is employed by the federal government is protected from sexual orientation discrimination as the result of several presidential executive orders.²³ Individuals alleging discrimination under these orders must first go through the formal internal agency review process at their place of employment before they are able to request a hearing or file a lawsuit.²⁴ While these orders extend a form of legal protection to nearly twenty-eight million workers, if executive orders served as the only shield against discrimination, nearly four-fifths of the working population would be left vulnerable to mistreatment based on their sexual orientation.²⁵

There are also scattered protections available through private employers. Corporate America has proven to be both a vocal mouthpiece and a fervent battleground for civil rights movements in the United States.²⁶ The movement toward workplace equality for LGBT employees has continued this trend, as evidenced by the dramatic increase in the number of workplaces offering anti-discrimination

23 Exec. Order No. 13,672, 41 C.F.R. §§ 60.1, 60.2, 60.4, and 60.50 (2014) (adding gender identity to the protections created by Executive Orders 13,087 and 13,279).

24 *Overview Of Federal Sector EEO Complaint Process*, U.S. Equal Employment Opportunity Commission, http://www.eeoc.gov/federal/fed_employees/complaint_overview.cfm.

25 *An Important Step Toward Workplace Equality: An Executive Order on Federal Contractors*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/resources/an-important-step-toward-workplace-equality-an-executive-order-on-federal-c>.

26 See generally JENNIFER DELTON, *RACIAL INTEGRATION IN CORPORATE AMERICA, 1940–1990* (2009) (tracing American corporations' extraordinary transformations, from endorsing racially exclusionary employment practices in the 1960s to implementing affirmative action and calls for diversity thirty years later); WOMEN'S RIGHTS: PEOPLE AND PERSPECTIVES ch. 7–10, 11 (Crista DeLuzio & Peter C. Mancall, eds.) (several chapters discussing the history of increasing women's participation in the workforce and labor and civil rights movements).

protection in their hiring and firing practices.²⁷ The Fortune 500, which employs about twenty-seven million people (seventeen percent of the nation's overall workforce),²⁸ has been extending workplace protections that recognize the value and legitimacy of LGBT employees and their families at a much faster pace than our nation's lawmakers. In fact, ninety-one percent of these companies currently extend workplace protections on the basis of sexual orientation, and sixty-one percent of them explicitly cover gender identity.²⁹ These statistics are especially astounding considering that when the Human Rights Campaign (HRC) first published its Corporate Equality Index in 2002, "only thirteen companies achieved perfect scores [out] of [the] three hundred and nineteen surveyed."³⁰ The 2016 Equality Index³¹ had "a record 407 businesses, spanning nearly every industry and geography," earning a top score despite increasingly stringent evaluating factors.³²

Regardless of whether businesses are using their influence as a force for goodwill, in response to public policy, or simply out of self-interest because protecting LGBT workers positively impacts their bottom line³³ (or a combination of these factors), "business practices help both to define and to reflect our values" as Americans.³⁴ Notwithstanding the growing number of businesses providing anti-discrimination protections to their LGBT employees, there is much work left to do. Too many companies still fail to guarantee basic, vital workplace protections, and countless LGBT workers' livelihoods are left to the mercy of employers that can fire them for their sexual orientation or gender identity.³⁵

27 See HUMAN RIGHTS CAMPAIGN FOUND., CORPORATE EQUALITY INDEX 2016: RATING AMERICAN WORKPLACES ON LESBIAN, GAY, BISEXUAL, AND TRANSGENDER EQUALITY 18–19 (2016), <http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/CEI-2016-FullReport.pdf>.

28 Claire Zillman & Stacy Jones, *7 Fortune 500 Companies with the Most Employees*, FORTUNE (June 13, 2015), <http://fortune.com/2015/06/13/fortune-500-most-employees/>.

29 Lisa Mahapatra, *90 Percent of Fortune 500 Companies Are LGBT Friendly [CHARTS]*, INT'L BUS. TIMES (Dec. 9, 2013, 3:08 PM), <http://www.ibtimes.com/90-percent-fortune-500-companies-are-lgbt-friendly-charts-1501280>.

30 Richard Socarides, *Corporate America's Evolution on L.G.B.T. Rights*, NEW YORKER (Apr. 27, 2015), <http://www.newyorker.com/business/currency/corporate-americas-evolution-on-l-g-b-t-rights>.

31 HUMAN RIGHTS CAMPAIGN FOUND., *supra* note 27, at 11–13 (ranking companies on their non-discrimination policies, employment benefits, responsible citizenship, and commitment to LGBT equality).

32 *New HRC Report Reveals Record-Setting LGBT Inclusion in Corporate America—with California Companies Leading the Way*, BULLDOG REP. (Nov. 18, 2015), <https://www.bulldogreporter.com/new-hrc-report-reveals-record-setting-lgbt-inclusion-in-corporate-america-with-california-companies-leading-the-way/>.

33 See M.V. LEE BADGETT ET AL., THE RELATIONSHIP BETWEEN LGBT INCLUSION AND ECONOMIC DEVELOPMENT: AN ANALYSIS OF EMERGING ECONOMIES 2 (2004) (finding a clear positive correlation between per capita GDP and the legal rights for LGBT people); Brad Sears & Christy Mallory, *Chapter 41: How LGBT-Related Workplace Policies Can Have a Positive Impact on the Corporate Bottom Line*, in GENDER IDENTITY AND SEXUAL ORIENTATION DISCRIMINATION IN THE WORKPLACE 41-1, 41-6–41-9 (Christine Michelle Duffy & Denise M. Visconti, eds., 2014), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/CH41-LGBT-Related-Workplace-Policies-Sears-Mallory.pdf>.

34 Socarides, *supra* note 30, ¶ 10.

35 See Brad Sears & Christy Mallory, *Chapter 40: Employment Discrimination Against LGBT People: Existence and Impact*, in GENDER IDENTITY AND SEXUAL ORIENTATION DISCRIMINATION IN THE WORKPLACE 40-1, 40-3–40-7 (Christine Michelle Duffy & Denise M. Visconti, eds., 2014), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/CH40-Discrimination-Against-LGBT-People->

B. Local and State-Based Protections

Beyond the workplace, an LGBT person also has to look at protections that may be provided to them at the local and state level. These geographically-based protections can vary greatly and could be reasonably expected to impact where an LGBT family decides to live and work. For instance, a person living in Illinois would give up an explicit state prohibition on discrimination based on sexual orientation and gender identity³⁶ if he or she decided to work in Kentucky, where there are no statewide anti-discrimination laws on the books for LGBT individuals.³⁷ More than one-third of all states specifically ban workplace discrimination in the private sector based on sexual orientation and gender identity, and only a handful of states ban discrimination based on sexual orientation in the private sector.³⁸ A growing number of city and local governments have added another layer of protection for LGBT employees. “As of January 28, 2016, at least 225 cities and counties prohibit employment discrimination on the basis of gender identity in employment ordinances that governed all public and private employers in those jurisdictions.”³⁹

C. Elusive Federal Legislation

There is no federal law that expressly forbids workplace discrimination against LGBT people or those perceived to fall outside the bounds of accepted heteronormativity. The absence of such a law is not the result of a lack of effort—bills containing some form of intent at prohibiting workplace discrimination for LGBT workers have been submitted to Congress every year since 1974.⁴⁰ While the public opinion largely appears to be shifting toward LGBT equality in all facets of American life, the federal government has been slow to respond. It is surprising that even immediately after *Obergefell*,⁴¹ when fifty-five percent of American adults were found to support LGBT legal equality,⁴² that federal legislation still would seem so far from being passed.

Sears-Mallory.pdf; see also NAT'L CTR. FOR TRANSGENDER EQUAL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY EXECUTIVE SUMMARY 10–11 (2016), <http://www.ustranssurvey.org/report> (finding high unemployment rates among transgender populations and negative outcomes in hiring and on the job as a result of discrimination on basis of gender identity).

36 Illinois Human Rights Act, 775 ILL. COMP. STAT. 5/ (2012 & Supp. 2016).

37 CHRISTY MALLORY & BRAD SEARS, EMPLOYMENT DISCRIMINATION BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY IN KENTUCKY 8 (2015), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Kentucky-ND-February-2015.pdf>.

38 See *In Your State*, LAMBDA LEGAL, <http://www.lambdalegal.org/states-regions/in-your-state> (last visited Mar. 31, 2017).

38 *Cities and Counties with Non-Discrimination Ordinances that Include Gender Identity*, HUM. RTS. CAMPAIGN, <http://www.hrc.org/resources/cities-and-counties-with-non-discrimination-ordinances-that-include-gender> (last visited Mar. 31, 2017).

39 *A History of Federal Non-Discrimination Legislation*, HUM. RTS. CAMPAIGN, <http://www.hrc.org/resources/a-history-of-federal-non-discrimination-legislation> (last visited Mar. 31, 2017).

41 *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

42 *Changing Attitudes on Gay Marriage*, PEW RES. CTR. (May 12, 2016), <http://www.pewforum.org/2015/07/29/graphics-slideshow-changing-attitudes-on-gay-marriage/>.

Perhaps the most well-known attempt at a comprehensive anti-discrimination bill for LGBT employees is the Employment Non-Discrimination Act (ENDA).⁴³ ENDA's passage would prohibit discrimination in hiring and employment on the basis of sexual orientation or gender identity by employers with at least fifteen employees,⁴⁴ and it has been introduced at every Congress since 1994, excluding the 109th.⁴⁵ The bill has struggled to gain enough traction to overcome Republican opposition, and the LGBT community has been divided on whether it is acceptable to remove transgender protections as a method of obtaining additional Republican votes.⁴⁶ The transgender community is the population that is the most vulnerable to workplace discrimination,⁴⁷ and the most recent version of ENDA was trans-inclusive when it successfully passed through the Senate with bipartisan support.⁴⁸ Even though the Senate's approval was promising, there has been little progress since,⁴⁹ and much of the Bill's teeth have been systematically removed through a series of broad religious carve outs.⁵⁰

The newest hope for federal antidiscrimination legislation was Senate Bill 1858, otherwise known as the Equality Act of 2015.⁵¹ If passed, this ambitious Bill would effectively amend the Civil Rights Act of 1964 to include protections that ban discrimination on the broad basis of sexual orientation, gender identity, and sex⁵² in employment, housing, federal funding, the jury system, and public accommodations.⁵³ In a relatively short amount of time, the Equality Act received official public support

43 S. 815, 113th Cong. (2013). This bill passed the Senate on November 7, 2013, and the latest action was on January 8, 2014, where it was referred to the Subcommittee on the Constitution and Civil Justice. *All Bill Information (Except Text) for S.815—Employment Non-Discrimination Act of 2013*, CONGRESS.GOV, <https://www.congress.gov/bill/113th-congress/senate-bill/815/all-info> (last visited Mar. 31, 2017). It has since been replaced by the Equality Act. *ENDA Replaced by Broader Equality Act*, CUPA-HR: HIGHER EDUC. WORKPLACE BLOG (Aug. 4, 2015), <http://blog.cupahr.org/2015/08/enda-replaced-by-broader-equality-act>.

44 S. 815 § 3(a)(5)(A).

45 See *LGBT Rights in the Workplace: The ENDA Debate Continues*, CONG. DIG., Dec. 2013, at 1, <http://congressionaldigest.com/issue/lgbt-rights-in-the-workplace/enda-timeline/>.

46 See Paul Schindler, *HRC Alone in Eschewing No-Compromise Stand*, GAY CITY NEWS (Oct. 4, 2007), http://web.archive.org/web/20080409024947/http://www.gaycitynews.com/site/news.cfm?newsid=18883568&BRD=2729&PAG=461&dept_id=568864&rft=6.

47 See JAMIE M. GRANT, LISA A. MOTTET, JUSTIN TANIS, JACK HARRISON, JODY L. HERMAN & MARA KEISLING, NAT'L CTR. FOR TRANSGENDER EQUAL. & NAT'L GAY & LESBIAN TASK FORCE, INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 2–3, 8, 50–51, 53–54, 56–62 (2011) (finding that transgender individuals are four times more likely to have annual household income under \$10,000 and that 63% reported experiencing serious acts of discrimination that had a “major impact” on their lives).

48 S. 815, *supra* note 43, §§ 1–4, 9.

49 See Chris Johnson, *House Panel Rejects Last-Ditch Effort to Pass ENDA*, WASH. BLADE (Dec. 3, 2014, 8:56 PM), <http://www.washingtonblade.com/2014/12/03/house-panel-rejects-last-ditch-panel-pass-enda/>.

50 See *ENDA Religious Exemption—Fact Sheet*, THE LEADERSHIP CONF., <http://www.civilrights.org/lgbt/enda/religious-exemption.html> (last visited Mar. 31, 2017).

51 S. 1858, 114th Cong. (2015).

52 *Id.* §§ 3(a)(1), 1101(a)(2), (4), (5) (defining “sex” to include a sex stereotype, sexual orientation or gender identity, and pregnancy, childbirth, or a related medical condition; “sexual orientation” as homosexuality, heterosexuality, or bisexuality; and “gender identity” as gender-related identity, appearance, mannerisms, or characteristics, regardless of the individual's designated sex at birth).

53 *Id.* §§ 2(14), 3, 6, 7, 10.

from former President Obama⁵⁴ as well as many large businesses.⁵⁵ Despite the initial swell of support behind this bill, its progress has since stagnated. After its introduction to the Senate in July of 2015, it has been read twice and referred to the Committee on the Judiciary. There have been no actions since then. The political climate under President Trump casts doubt on whether the Equality Act will ever get congressional approval, but the public support it has garnered so far “further elevates the question of whether [LGBT] Americans need greater legal safeguards.”⁵⁶

It is clear that the local, state, and government employee antidiscrimination laws create a sporadic, complicated patchwork of protections for LGBT individuals and their families. Although comprehensive federal legislation would provide explicit protection for sexual orientation and gender identity, its passage has been frustratingly slow and it is weakened by new and preexisting religious exemptions.⁵⁷

II. THE PROMISE AND FRUSTRATION OF TITLE VII

Title VII of the Civil Rights Act of 1964 is a federal law that prohibits employers from discriminating against employees on the basis of sex, race, color, national origin, and religion.⁵⁸ It generally applies to employers with fifteen or more employees, including federal, state, and local governments.⁵⁹ Congress passed Title VII to codify that discrimination in employment is not tolerated because such treatment was recognized to have many detrimental effects on employees, the

54 Juliet Eilperin, *Obama Supports Altering Civil Rights Act to Ban LGBT Discrimination*, WASH. POST (Nov. 10, 2015), https://www.washingtonpost.com/politics/obama-supports-altering-civil-rights-act-to-include-gender-discrimination/2015/11/10/3a05107e-87c8-11e5-9a07-453018f9a0ec_story.html.

55 See HRC staff, *Corporate Giants Announce Support for Federal LGBT Non-Discrimination Protections*, HUM. RTS. CAMPAIGN: HRC BLOG (July 28, 2015), <http://www.hrc.org/blog/momentum-builds-corporate-giants-announce-support-for-federal-lgbt-non-disc>; Stephen Peters, *Major Corporations Announce Support for Landmark Federal LGBT Non-Discrimination Legislation*, HUM. RTS. CAMPAIGN: HRC BLOG (July 23, 2015), <http://www.hrc.org/blog/major-corporations-announce-support-for-landmark-federal-lgbt-non-discrimin>.

56 Stephen Peters, *Major Corporations Announce Support for Landmark Federal LGBT Non-Discrimination Legislation*, HUM. RTS. CAMPAIGN: HRC BLOG (July 23, 2015), <http://www.hrc.org/blog/major-corporations-announce-support-for-landmark-federal-lgbt-non-discrimin>.

57 See, e.g., S. 1858, 114th Cong. (2015). The Equality Act has fewer religious exemptions than ENDA. It would not change the religious exemptions already in place in federal law. Religious entities that are currently exempt will remain exempt with regard to expressing a preference for people of their faith in employment, under Sections 702(a) and 703(e) of Title VII and for the sale, rental, or occupancy of a dwelling owned by a religious organization for non-commercial purposes (under Section 3607 of the Fair Housing Act) will remain allowed to do so.

58 Title VII, 42 U.S.C. § 701. See also Title VII Section 703(a)(1), provides, in relevant part: “It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.”

59 § 701.

workplace, and productive efficiency.⁶⁰ Broadly, the clear and unequivocal intent of the Civil Rights Act was to “eradicate race discrimination” and to “strike at the entire spectrum of disparate treatment of men and women.”⁶¹ Over the last few decades, Title VII has provided a federal avenue for some LGBT workers to access legal recourse for certain types of discrimination claims, although the debated historical intent⁶² of the “sex” provision has forced federal courts to develop their own doctrine to determine the scope of Title VII’s prohibition on sex discrimination.⁶³ The varying interpretations of this provision could ultimately help facilitate the successful incorporation of the EEOC’s position into the federal courts that sexual orientation discrimination is *always* a form of sex discrimination.⁶⁴

Two of the main interpretations of Title VII in relation to LGBT claims involves discrimination based on biological sex⁶⁵ and gender nonconformity.⁶⁶ The Supreme Court first officially recognized “sex stereotyping” as a cause of action under the theory of sex discrimination in 1989 in *Price Waterhouse v. Hopkins*.⁶⁷ The plaintiff was denied a promotion at her accounting firm because she failed to conform to her supervisors’ expectations regarding how a female should act.⁶⁸ Her supervisors asked her to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”⁶⁹ The Court took a broad view of Title VII that was focused on the intent of the alleged perpetrators (here, her supervisors) and held that “gender must be irrelevant to employment decisions.”⁷⁰ The Court also stated the belief that society is “beyond the day when an employer could evaluate employees by assuming or insisting that they match the stereotype associated with their group.”⁷¹

The question of how to deal with occurrences of same-sex sexual harassment was addressed in *Oncale v. Sundowner Offshore Services*.⁷² The male complainant, Joseph Oncale, alleged that he was sexually harassed and physically assaulted by coworkers at his workplace, in violation of Title VII’s prohibition against sex discrimination.⁷³ The Court unanimously held that even though Title VII does not prohibit all verbal or physical harassment in the workplace, it does bar all forms of

60 *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973) (“The broad, overriding interest, shared by employer, employee and consumer, is efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions.”).

61 *L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978).

62 Stephen Befort & Michael Vargas, *Same-Sex Marriage and Title VII*, 56 SANTA CLARA L. REV. 207, 212–19 (2015).

63 Velma Cheri Gay, *50 Years Later ... Still Interpreting the Meaning of “Because of Sex” within Title VII and whether it Prohibits Sexual Orientation Discrimination*, 73 A.F. L. REV. 61, 72–76 (2015).

64 *Baldwin*, 2015 WL 4397641.

65 *Id.* at 62.

66 *Id.*

67 490 U.S. 228, 248 (1989).

68 *Id.* at 233.

69 *Id.* at 235.

70 *Id.* at 228.

71 *Id.* at 251.

72 523 U.S. 75 (1998).

73 *Id.* at 76–77.

discrimination “because of” sex.⁷⁴ Discrimination “because of” sex, whether motivated by prurient interests or not, is actionable if it places the victim in a prejudicial working condition, regardless of the victim’s gender.⁷⁵ The Court’s opinion listed three ways in which a plaintiff could prove such a claim: credible evidence that the harasser was a homosexual, general hostility to the presence of women in the workplace, or comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace.⁷⁶ While this case lent optimism that sex discrimination under Title VII would be expanded,⁷⁷ these three scenarios were seen as an exhaustive list by some lower courts.⁷⁸

After *Price Waterhouse*, sex-stereotyping discrimination claims proved not only actionable, but also increasingly more successful for LGBT plaintiffs, largely because of society’s continuously shifting understanding of sex and the increase in public support of non-heteronormative sexual orientations.⁷⁹ Courts have reasoned somewhat differently in cases involving transgender complainants and “LGB” complainants, but EEOC Commissioner, Chai Feldblum, has publicly stated that discrimination against transgender workers categorically violates *Price Waterhouse*, and that discrimination against LGB workers does the same.⁸⁰ The shift in public opinion and in the Court’s reasoning initially made it difficult for courts to strictly differentiate between claims based on gender and claims based on sexual orientation.⁸¹ For example, a man (gay or otherwise) may be harassed in an attempt to emasculate them,⁸² or he could be subject to anti-gay slurs not simply because he is gay, but because there is a discrepancy between the his expressed gender behavior

74 *Id.* at 78.

75 *Id.* at 79–80.

76 *Id.* In the opinion Justice Scalia noted “statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principle concerns of our legislators by which we are governed.”

77 See generally Matthew Fedor, *Can Price Waterhouse and Gender Stereotyping Save the Day for Same-Sex Discrimination Plaintiffs Under Title VII? A Careful Reading of Oncale Compels an Affirmative Answer*, 32 SETON HALL L. REV. 455 (2002).

78 See, e.g., EEOC v. Boh Brothers Construction Co., 689 F.3d 458 (5th Cir. 2012); Wasek v. Arrow Energy Services, Inc., 682 F.3d 463 (6th Cir. 2012).

79 Andrew R. Flores, *National Trends in Public Opinion on LGBT Rights in the United States*, WILLIAMS INSTITUTE (2014), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/POP-natl-trends-nov-2014.pdf>.

80 See Equal Employment Agency No Longer Turning Away Gay Discrimination Claims, NPR (Apr. 2, 2014, 11:47 AM), <http://www.npr.org/2014/04/02/298328951/equal-employment-agency-no-longer-turning-away-gay-discrimination-claims>; see also Ann C. McGinley, *Erasing Boundaries: Masculinities, Sexual Minorities, and Employment Discrimination*, 43 U. MICH. J.L. REF. 713, 768–72 (2010) (claiming that antigay discrimination enforces a normative vision of masculinity forbidden by *Price Waterhouse*); Zachary A. Kramer, Note, *The Ultimate Gender Stereotype: Equalizing Gender-Conforming and Gender-Nonconforming Homosexuals Under Title VII*, 2004 U. ILL. L. REV. 465, 489–97 (claiming that sexual orientation is incorporated into gender, and discrimination against it therefore constitutes sex stereotyping).

81 See Dawson v. Bumble & Bumble, 398 F.3d 211, 217 (2d Cir. 2005) (“It is often difficult to discern when Dawson is alleging that the various adverse employment actions allegedly visited upon her . . . were motivated by animus toward her gender, her appearance, her sexual orientation, or some combination of these.”).

82 E.g., Befort & Vargas, *supra* note 62.

and the behavior expected of a person of that particular biological sex.⁸³ While some courts have rejected sex-stereotyping claims brought by LGBT employees based on the “anti-bootstrapping” principle⁸⁴ or the “horseplay” exception,⁸⁵ under *Price Waterhouse*, a claimant’s sexual orientation should have no impact on the success of a claim based on gender nonconformity as long as the discrimination would not occur “but for the victim’s sex.”⁸⁶ Chief Justice Roberts discussed this concept in dicta when he opined: “If Sue loves Joe and Tom loves Joe, Sue can marry him and Tom can’t. And the difference is based upon their different sex. Why isn’t that a straightforward question of sexual discrimination?”⁸⁷

Sex discrimination under Title VII has not yet fully extended to apply beyond biological sex to sexual orientation. If the animus toward an employee was motivated by that person’s sexual orientation, as opposed to how a “real man” looks or behaves, a claim of sex discrimination under Title VII generally will not succeed.⁸⁸ Courts have been clear in holding that sexual orientation is not a protected class under Title VII.⁸⁹ In *Higgins v. New Balance Athletic Shoe, Inc.*, for example, the court stated, “[it is] settled law that, as drafted and authoritatively construed, Title VII does not proscribe harassment simply because of sexual orientation.”⁹⁰ Ironically, the courts have considered sexual orientation in cases regarding straight employees’ interactions with even *potentially* gay coworkers. Heterosexual employees have been protected under Title VII from homosexual supervisors,⁹¹ while LGBT-employee victims are rarely offered the same protections, especially if the offending supervisor or coworker is an “equal opportunity” harasser.⁹² Ultimately, LGB plaintiffs in Title VII cases

83 See Olivia Szwalbneist, *Discriminating because of “Pizzazz”: Why Discrimination Based on Sexual Orientation Evidences Sexual Discrimination under the Sex-Stereotyping Doctrine of Title VII*, TEX. J. WOMEN & L. 75, 90 (2011).

84 *Desantis v. Pacific Tel. & Tel. Co., Inc.*, 608 F.2d 327, 330 (9th Cir. 1979) (“Appellants now ask us to employ the disproportionate impact decisions as an artifice to ‘bootstrap’ Title VII protection for homosexuals under the guise of protecting men generally.”) (emphasizing the idea that gender stereotyping claims should not be used to bootstrap protection for sexual orientation).

85 See Befort & Vargas, *supra* note 62 at fn. 97. This exception excuses conduct that takes place in all-male employment situations that may be sexually explicit and sometimes even abusive conduct. This is based on the idea “that it is socially acceptable for men to ‘behave badly’ in the workplace and that the behavior is not ‘because of’ sex.

86 *Smith v. City of Salem*, 378 F.3d 566, 574 (6th Cir. 2004).

87 *What they said: Excerpts from Supreme Court arguments over state bans on gay marriage*, US NEWS (April 28, 2015), <http://www.usnews.com/news/politics/articles/2015/04/28/what-they-said-supreme-court-quotes-on-gay-marriage>.

88 Mary Anne Case, *Legal Protections for the “Personal Best” of Each Employee: Title VII’s Prohibition on Sex Discrimination, the Legacy of Price Waterhouse v. Hopkins, and the Prospect of ENDA*, 66 STAN. LAW REV. 1333, 1350 (2014).

89 See, e.g., *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1084 (7th Cir. 2000) (“harassment based solely upon a person’s sexual preference or orientation (and not on one’s sex) is not an unlawful employment practice under Title VII.”); see also *Dawson v. Bumble & Bumble*, 398 F.3d 211, 217 (2d. Cir. 2005) (“[t]he law is well-settled in this circuit and in all others to have reached the question that Title VII does not prohibit harassment or discrimination because of sexual orientation.”).

90 194 F.3d 252, 259 (1st Cir. 1999).

91 Befort & Vargas, *supra* note 62.

92 *Id.* at 119.

have an “artificially high barrier”⁹³ because they must prove that they faced discrimination because of their sex and *not* because of their sexual orientation.⁹⁴

III. *MACY V. HOLDER* AND ITS IMPACT ON TITLE VII INTERPRETATIONS

Within Title VII, Congress created the EEOC to interpret and enforce federal laws prohibiting discrimination on a variety of personal characteristics in the workplace.⁹⁵ The EEOC is an independent, bipartisan administrative agency with the authority to make rules, investigate accusations of discrimination against covered employers, and hold employers accountable for any illegal mistreatment of employees.⁹⁶ Under Title VII, any person who wants to file a lawsuit in court regarding discrimination must first file a charge with the EEOC and cooperate with an investigation.⁹⁷ The EEOC has been instrumental in protecting individual rights since its inception in 1965,⁹⁸ and this trend is poised to continue in the area of LGBT rights. The EEOC’s decisions are not binding in federal court, but the United States Supreme Court has stated that EEOC decisions “constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.”⁹⁹ The EEOC’s decisions have also provided direction for leading LGBT legal organizations.¹⁰⁰

The EEOC has issued two important administrative decisions within the last five years involving federal employees that strongly suggest the adoption of a broad, LGBT-encompassing view of what constitutes prohibited sex discrimination under Title VII: *Macy v. Holder*¹⁰¹ and *Baldwin v. Foxx*.¹⁰² In *Macy*, the EEOC ruled that the term “sex” in Title VII inherently encompasses both biological sex and gender, and that any employer who discriminates or harasses an employee because they are

93 Befort & Vargas, *supra* note 62.

94 See Bennett Capers, *Sex(ual Orientation) and Title VII*, 91 COLUM. L. REV. 1158, 1159 (1991); Zachary Kramer, *Of Meat and Manhood*, 89 WASH. U. L. REV. 287 (2011) (“if a claim makes any mention of homosexuality, then it is a sexual orientation claim and must fail. . . [T]he deck is stacked against lesbian and gay employees who seek to raise gender-stereotyping claims. . .”).

95 See Title VII of the Civil Rights Act of 1964 (creating the U.S. Equal Employment Opportunity Commission); 42 U.S.C. § 2000e-16 (2012) (delegating authority to the EEOC to adjudicate claims involving federal employees); see also *Federal Laws Prohibiting Job Discrimination Questions And Answers*, EEOC, <http://www.eeoc.gov/facts/qanda.html> (describing EEOC’s authority).

96 On July 2, 1965, the EEOC was established; its mandate is specified under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967 (ADEA), the Rehabilitation Act of 1973, the Americans with Disabilities Act (ADA) of 1990, and the ADA Amendments Act of 2008. See *About EEOC*, U.S. EEOC, <https://www.eeoc.gov/eeoc/index.cfm>.

97 *Id.*

98 See Margaret H. Lemos, *The Consequences of Congress’s Choice of Delegate: Judicial and Agency Interpretations of Title VII*, 63 VAND. L. REV. 363, 390 (2010) (noting that when the EEOC addressed issues in Supreme Court Title VII litigation, it adopted liberal, pro-plaintiff positions ninety-one percent of the time).

99 *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986) (quoting *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 141-42 (1976)) (internal quotation mark omitted).

100 The Q & A section of LambdaLegal.org states the “(EEOC) has determined that firing someone because they married a person of the same sex constitutes impermissible sex discrimination under federal law.”

101 NO. 0120120821, 2012 WL 1435995 (E.E.O.C. Apr. 20, 2012).

102 *Baldwin*, 2015 WL 4397641 *24 n.11.

transgender necessarily “has engaged in disparate treatment ‘related to the sex of the victim.’”¹⁰³

The *Macy* case involved Mia Macy, a transgender woman.¹⁰⁴ When she applied for a position at a laboratory within the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), she still presented publically as a man and had not yet transitioned to living full time as a woman.¹⁰⁵ The director of the lab told her that if her background check passed successfully, she could have the position.¹⁰⁶ Three months later, Macy shared with the staffing firm that she was “in the process” of transitioning from male to female.¹⁰⁷ Macy requested that the staffing firm notify the lab of her transition. She was told to expect her background check within a week, but she never received the results of the investigation and she was eventually told that the position was “no longer available.”¹⁰⁸ Macy was alarmed about this sudden change of course, and she contacted an agency EEO counselor to discuss her concerns.¹⁰⁹ The counselor later informed her that the position had not been cut but, rather, that someone else had been hired for the position.¹¹⁰ This information led Macy to file a complaint.¹¹¹ The ATF refused to process her gender identity discrimination claim under Title VII, so she appealed to the EEOC.¹¹²

The EEOC’s holding was helpful for more than just stating that “claims of discrimination based on transgender status, also referred to as claims of discrimination based on gender identity, are cognizable under Title VII sex discrimination prohibition.”¹¹³ The EEOC also offered two rationales by which a person would be able to support a discrimination claim. First, the sex-stereotyping approach that roots any discrimination against a transgender person in gender stereotypes;¹¹⁴ and second, the per se approach that states any discrimination is inherently sex discrimination because it relates to a change in sex.¹¹⁵ The EEOC “jump[ed] into the fray” of courts adopting conflicting positions of whether and how transgender plaintiffs may bring Title VII claims when it directly interpreted Title VII to provide protection and effectively provided an approach for discrimination claims that courts may be willing to accept.¹¹⁶

Although *Macy* involved a transgender individual, a closer look at the body of jurisprudence the EEOC decision left behind provides insight as to how the recent *Baldwin* decision will impact LGB discrimination claims in the upcoming years.

103 Macy, 2012 WL 1435995, at *1.

104 *Id.*

105 *Id.*

106 *Id.*

107 *Id.*

108 *Id.*

109 *Id.*

110 *Id.* at *2.

111 *Id.*

112 *Id.* at *3.

113 Macy, 2012 WL 1435995, at *4.

114 *Id.* at *8.

115 *Id.* at *5–11.

116 *Employment Law – Title VII – EEOC Affirms Protections for Transgender Employees*, 126 Harv. L. Rev. 1731 (2015).

Before *Macy*, cases dealing with transgender individuals were inconsistent, although the trend was favoring the coverage of transgender employees against discrimination.¹¹⁷ The years following *Macy* saw federal court decisions involving sex discrimination fall in support of transgender individuals, although many of them failed to cite the EEOC decision explicitly.¹¹⁸ An overwhelming majority of the courts focused their legal analysis on the framework of logic that *Price Waterhouse* provided – that the Supreme Court had effectively “eviscerated” the “narrow view” of “sex” that had been articulated in earlier Title VII cases¹¹⁹ and that “it would seem that any discrimination against transsexuals (as transsexuals) -- individuals who, by definition, do not conform to gender stereotypes -- is proscribed by Title VII’s proscription of discrimination.”¹²⁰

Recently, and for the first time in the agency’s history, the EEOC filed two federal lawsuits against companies for allegedly violating sex discrimination laws by firing transgender employees based on their gender identity.¹²¹ In the first case, *EEOC v. Lakeland Eye Clinic*,¹²² the EEOC claimed that managers and employees at the eye clinic “ostracized and ridiculed” the plaintiff after she informed the company that she was transgender.¹²³ She was told her position was terminated, but the company later hired a man to fill her spot.¹²⁴ Similar to *Lakeland Eye Clinic*, the second case that was filed also involved a transgender woman who, despite satisfactory job performance evaluations, was quickly fired after informing her company that she intended to undergo transition surgery.¹²⁵ Her employer did not hide its position and called her plan to transition “unacceptable.”¹²⁶ The press statement for both cases explains that the suits are based on the *Macy* decision, and

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- 117 See generally *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011); *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1221 (10th Cir. 2007); *Schwenck v. Hartford*, 204 F.3d 1187, 1201–02 (9th Cir. 2000) (noting that “the initial approach” taken in earlier federal appellate Title VII cases rejecting claims by transgender plaintiffs “has been overruled by the language and logic of *Price Waterhouse*”); *Miles v. New York Univ.*, 979 F. Supp. 248, 249–50 (S.D.N.Y. 1997); *Dobre v. Nat’l R.R. Passenger Corp.*, 850, F. Supp. 284, 287 (E.D. Pa. 1993).
- 118 See *Finkle v. Howard Cty.*, 12 F. Supp. 3d 780 (D. Md. 2014); *Parris v. Keystone Foods, LLC*, 959 F. Supp. 2d 1291 (N.D. Ala. 2013), appeal docketed, No. 13-14495-D (Oct. 1, 2013); *Radtke v. Misc. Drivers & Helpers Union Local #638 Health, Welfare, Eye & Dental Fund*, 867 F. Supp. 2d 1023 (D. Minn. 2012).
- 119 *Radtke v. Miscellaneous Drivers & Helpers Union Local #638 Health, Welfare, Eye, & Dental Fund*, 867 F. Supp. 2d 1023 (D. Minn. 2012) (citing *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004)).
- 120 See *Finkle*, 12 F. Supp. 3d at 788 (basing the court’s interpretation on the holding in *Price Waterhouse*).
- 121 PRESS RELEASE, EEOC, *EEOC Sues Lakeland Eye Clinic for Sex Discrimination Against Transgender Employee* (Sept. 25, 2014), <http://www.eeoc.gov/eeoc/newsroom/release/9-25-14e.cfm>.
- 122 Complaint, *EEOC v. Lakeland Eye Clinic*, No. 8:25-cv-2421-T35 AEP (M.D. Fla. Sept. 25, 2014). On April 9, 2015, the U.S. District Court in Tampa approved an agreement in which Lakeland Eye Clinic will pay \$150,000 to settle the lawsuit. Lakeland also agreed to implement a new gender discrimination policy and to provide training to its management and employees regarding transgender/gender stereotype discrimination. *Lakeland Eye clinic will Pay \$150,000 to Resolve Transgender / Sex Discrimination Lawsuit*, EEOC, <https://www.eeoc.gov/eeoc/newsroom/release/4-13-15.cfm>.
- 123 *Id.* at 4.
- 124 *Id.* at 4.
- 125 Complaint at 4, *EEOC v. R.G. & G.R. Harris Funeral Homes Inc.* 201 F. Supp. 3d 837 (E.D. Mich. 2016).
- 126 *Id.* at 4.

the EEOC argues that the transgender employees were fired because they “did not conform to their employer's gender-based expectations, preferences or stereotypes.”¹²⁷

Even though *Lakeland* went on to settle, the fact that the EEOC has begun to file LGBT-related lawsuits under Title VII challenging alleged sex discrimination is promising because it appears to be enabling and encouraging more transgender employees to file complaints. According to the official EEOC website, the agency received 147 complaints of gender identity discrimination in the year following the *Macy* decision.¹²⁸ This number increased to 202 claims in 2014 and over 505 claims in only six months of recorded data for 2015.¹²⁹ Given that participating in an EEOC investigation is the first step in the process to file an employment discrimination claim in any court, there is a strong likelihood that more transgender discrimination claims will make their way into the state and federal courts. Lambda Legal, the nation's oldest and largest legal organization working for the civil rights of lesbians, gay men, and people with HIV/AIDS, supported and described the EEOC's actions as “a great development” because “action by the EEOC puts employers on notice and sends a clear message that discrimination based on gender identity is something to take seriously.”¹³⁰ Following *Macy*, individuals who file a complaint with the EEOC regarding transgender discrimination could have a much higher level of confidence in assuming that their claim will be “taken seriously and investigated in the same professional manner that all others are investigated.”¹³¹ This is supported by the fact that immediately following *Macy*, the EEOC made available LGBT cultural competency training for its investigation employees.¹³²

IV. LOOKING FORWARD: *BALDWIN V. FOXX*

On July 15, 2015, the EEOC issued its 3-2 *Baldwin v. Foxx* decision.¹³³ This decision is described as “a quiet triumphant ruling in favor of gay workers' rights,”¹³⁴ and it is projected to have landmark significance,¹³⁵ and serve as a “game changer”

127 Equal Emp't Opportunity Comm'n v. Lakeland Eye Clinic, No. 8:14-cv-2421-T-35AEP, 2015 WL 1802603 (M.D. Fla. April 1, 2015) (Verdict, Agreement and Settlement).

128 What You Should Know About EEOC and the Enforcement Protections for LGBT Workers, EEOC, http://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm; see also Lauren Sanders, *Effects of EEOC Recognition of Title VII as Prohibiting Discrimination Based on Transgender Identity*, 23 DUKE J. GENDER L. & POL'Y 264, 278 (2016);

129 EEOC, *supra* note 127; Sanders, *supra* note 128 at 278.

130 Workplace Issues for LGBT People and People with HIV, LAMBDA LEGAL: Out at Work (Sept. 14, 2015), http://www.lambdalegal.org/sites/default/files/out-at-work_ch2.pdf.

131 Lisa Mottet, Nat'l Gay & Lesbian Task Force, Movement Analysis: The Full Impact of the EEOC Ruling on the LGBT Movement's Agenda, at 4, 5 (2012), http://www.thetaskforce.org/static_html/downloads/reports/reports/eeoc_movement_analysis.pdf.

132 *Id.* at 4 n.10.

133 *Baldwin*, 2015 WL 4397641.

134 Joe Pinsker, *A Quiet Triumph for Gay Workers*, THE ATLANTIC, at 2 (July 22, 2015), <http://www.theatlantic.com/business/archive/2015/07/a-quietly-triumphant-ruling-in-favor-of-gay-workers-rights/399200/>.

135 Laura Maehtlen & Sam Schwartz-Fenwick, *The EEOC Rules That Existing Federal Law Prohibits Employment Discrimination Based on Sexual Orientation*, Workplace Class Action Blog (July 20, 2015), <http://www.workplaceclassaction.com/2015/07/the-eeoc-rules-that-existing-federal-law-prohibits-employment-discrimination-based-on-sexual-orientation/>.

for future LGBT employees who suffer workplace discrimination based on their sexual orientation.¹³⁶

In *Baldwin v. Foxx*, the complainant was a temporary employee at an air traffic control tower in Miami, Florida.¹³⁷ The Agency posted a vacancy announcement for a permanent position, but the complainant was ultimately not selected.¹³⁸ The complainant alleged that he was not selected because he was gay, referencing instances where he mentioned his partner at work and his supervisor said, “we don’t need to hear about that gay stuff,” and that on a number of occasions he was told he was “a distraction in the radar room” when his participation in conversations included any mention of his male partner.¹³⁹ The EEOC ultimately “conclude[d] that sexual orientation is inherently a ‘sex-based consideration,’ and that an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII.”¹⁴⁰

The implications of *Baldwin* can be anticipated through the extent of analysis the EEOC went through in reaching its decision. The reasoning behind the EEOC’s position in *Baldwin*, that sexual orientation discrimination is *always* a form of sex discrimination, spreads beyond the gender stereotyping logic that underlies *Price Waterhouse*.¹⁴¹ The EEOC in *Baldwin* criticized federal courts for “simply cit[ing to] earlier and dated decisions without any additional analysis,” when the courts interpreted Title VII’s prohibition of sex-based discrimination not to include protections against sexual orientation discrimination.¹⁴² The *Baldwin* case cited to *Price Waterhouse* to defend against any arguments raised concerning the formal creation of a new protected class under Title VII, and to emphasize that employers may not take gender into account when making employment decisions.¹⁴³ Unlike *Price Waterhouse*, the EEOC in *Baldwin* extended protection to a larger portion of the working LGBT community by concluding that “sexual orientation” as a concept cannot be defined or understood without reference to sex.¹⁴⁴ Following this interpretation, an employee could show that any sexual orientation discrimination he or she experienced was sex discrimination because it involved treatment that would not have occurred “but for” the individual’s sex; because it was based on the sex of the

136 Michael Vargas, *Why the EEOC’s Sexual Orientation Decision is a Game Changer*, ACS BLOG (Aug. 20, 2015), <https://www.acslaw.org/acsblog/why-the-eeoc%E2%80%99s-sexual-orientation-decision-is-a-game-changer>.

137 *Baldwin*, 2015 WL 4397641.

138 *Id.* at *1.

139 *Id.* at *2.

140 *Id.* at *5; *Price Waterhouse*, 490 U.S. at 251–52.

141 *Baldwin*, 2015 WL 4397641 at *8.

142 *Id.* at *24 n.11 (stating, “[M]any courts have gone to great lengths to distinguish adverse employment actions based on ‘sex’ from adverse employment actions based on ‘sexual orientation.’ The stated justification for such intricate parsing of language has been the *bare conclusion* that ‘Title VII does not prohibit . . . discrimination because of sexual orientation.’” (quoting *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000)).

143 See *Price Waterhouse*, 490 U.S. at 239–40 (plurality opinion) (explaining that when the Supreme Court decided that Title VII protected persons discriminated against because of gender stereotypes held by an employer, it did not thereby create a new protected class of “masculine women.”).

144 *Id.*

person(s) the individual associates with; and/or because it was premised on the fundamental sex stereotype, norm or expectation that individuals should be attracted only to those of the opposite sex.¹⁴⁵

The *Baldwin* case may have interpreted the pre-existing prohibition on discrimination “because of sex” to reach a broader context under Title VII, but, like *Macy*, the level of deference it will be afforded by federal courts will govern its overall influence outside the federal employment context. Similar to *Macy*’s inclusion of transgender protection under Title VII, the EEOC’s decision to include sexual orientation as a sex-based consideration in *Baldwin* is binding on all EEOC offices and federal agencies.¹⁴⁶ Following that analysis, and even without any executive orders in place, if an employer is a federal agency, it must recognize the inclusion of sexual orientation in anti-discrimination law and in its established employer policies.

The *Baldwin* analysis provides a convenient base from which the federal courts across the nation could endorse or echo the interpretation espoused by the EEOC when considering discrimination claims involving sexual orientation. However, even if it was suggested that the EEOC’s interpretations should receive deference from the courts, the court has often disagreed with the EEOC’s guidelines in other contexts, and it has been reluctant to grant deference even under the weaker *Skidmore* standard.¹⁴⁷ Even without courts formally deferring to the EEOC’s interpretation of “sex” under Title VII, the noticeable trend of federal courts following the reasoning of *Macy* without actually citing *Macy* in the years following the decision would support a similar outlook for the acceptance of *Baldwin*’s roadmap of reasoning by the courts. At the very least, it is possible that the EEOC’s *Baldwin* decision will alter the manner in which employers respond to allegations of sexual orientation discrimination.¹⁴⁸

Courts may also indirectly defer to the EEOC’s *Baldwin* interpretation simply through how it responds to the projected influx of sexual orientation-based discrimination claims. Comparable to *Macy*, the *Baldwin* decision could provide LGBT employees with a level of confidence in their ability to access some form legal

145 *Baldwin*, 2015 WL 4397641 at *10.

146 See Chris Geidner, *DOJ Accepts EEOC Ruling that Trans Bias Is Covered by Title VII, ATF Begins Investigation*, METRO WEEKLY (May 21, 2012, 11:55 PM), <http://www.metroweekly.com/poliglot/2012/05/the-department-of-justice-has.html> (explaining the EEOC holding is not the same as a ruling from the Supreme Court but that the decision is still substantial because it is binding on all EEOC field offices and federal departments and agencies).

147 See, e.g., *Young v. UPS, Inc.*, 135 S. Ct. 1338, 1351–52 (2015) (demonstrating that despite the Solicitor General arguing that the Court should give special, if not controlling, weight to an EEOC guidelines following *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), the deference given to the EEOC’s guidance was severely limited due to the EEOC’s timing, consistency, and thoroughness of consideration, and despite the agency’s level of experience).

148 Lisa Mottet, *Movement Analysis: The Full Impact of the EEOC Ruling on the LGBT Movement’s Agenda*, NAT’L GAY & LESBIAN TASK FORCE (2012), http://www.thetaskforce.org/downloads/reports/reports/eec_movement_analysis.pdf. (“Employers faced with an EEOC investigation that is taken seriously, and by an agency that unequivocally views discrimination against transgender people as illegal, are significantly more likely to mediate, give people their jobs back, stop the harassment that is occurring on the job, settle the case for a monetary amount, and generally work to make the situation better. The power of the EEOC to help change a workplace environment when a charge has been filed should not be understated.”).

recourse for sexual orientation-based discrimination at the workplace. As seen in the wake of *Macy*, there has been a dramatic increase from 2013 to 2014 in the number of complaints the EEOC has received alleging discrimination based on sexual orientation.¹⁴⁹ Following *Baldwin*, it is highly likely that the number of complaint receipts related to sexual orientation in 2015 will reach a record high, resulting in more cases potentially reaching the federal courts.¹⁵⁰ In addition to the increase in new claims reaching federal courts, leading LGBT legal groups have taken up the EEOC's ruling as an opportunity to revive cases under Title VII that had previously been dismissed by courts that had originally held the complainant did not have an actionable claim.¹⁵¹ After *Baldwin*, judges can no longer dismiss these claims outright.¹⁵²

On April 4, 2017, the Seventh Circuit became the first U.S. Court of Appeals to hold Title VII of the Civil Rights Act of 1964 protected employees from discrimination because of sexual orientation in *Hively v. Ivy Tech Community College*.¹⁵³ The majority opinion highlights that “sex” as a protected class has been incrementally extended by the Supreme Court in cases such as *Price Waterhouse v. Hopkins*, *Oncale v. Sundowner Offshore Services, Inc.*, and *Obergefell v. Hodges*, stating “[t]he goalposts have been moving over the years, as the Supreme Court has shed more light on the scope of the language that already is in the statute: no sex discrimination.”¹⁵⁴ The majority goes beyond the statutory interpretation tools of plain language, context, and legislative history, and notes “Congress may certainly choose to use both a belt and suspenders to achieve its objectives, and the fact that ‘sex’ and ‘sexual orientation’ discrimination may overlap in later statutes is of no help in determining whether sexual orientation discrimination is discrimination on the basis of sex for the purposes of Title VII.”¹⁵⁵ The *Hively* opinion further notes two important interpretations of “sex.” Narrowly, that discrimination against a lesbian must also necessarily be discrimination against a woman, and that “sex” embraces discrimination on the basis of intimate association with people of a protected classification, stating “[t]o the extent that [Title VII] prohibits discrimination on the basis of the race of someone with whom the plaintiff associates, it also prohibits discrimination on the basis of the national origin, or the color, or the religion, or (as relevant here) the sex of the associate.”¹⁵⁶

149 *What You Should Know About EEOC and the Enforcement Protections for LGBT Workers*, EEOC, http://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm.

150 *Filing a Charge of Discrimination*, EEOC, <http://www.eeoc.gov/employees/charge.cfm> (last visited Nov. 18, 2015) (describing that participating in an EEOC investigation is the first step in the process to file an employment discrimination claim in any court).

151 See Reply Brief of Plaintiff Appellant at 6, 11, 13, *Hively v. Ivy Tech Cmty. Coll.*, 830 F.3d 698 No. 15-1720 (7th Cir. 2016) (No. 151720), http://www.lambdalegal.org/in-court/legal-docs/hively_in_20150930_reply-brief.

152 See Plaintiff's Memorandum of Law in Support of His Motion for Recognition of the Dismissal of the Title VII Claim, *Zarda v. Altitude Express*, 2015 WL 4940928 (E.D.N.Y. Aug. 7, 2015) (No. 10 CV 4334 (JFB)).

153 *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 399 (7th Cir. 2017) (en banc).

154 *Id.* at 344.

155 *Id.*

156 *Id.* at 349

Another point of comparison between *Macy* and *Baldwin* that offers promising insight as to what the future might hold for interpreting Title VII to include sexual orientation claims is the trend in outcome of the court decisions both before and after the EEOC issued its formal decisions. The legal community was familiar with the argument presented in *Macy* for many years before the EEOC issued a formal opinion. Similarly, courts have witnessed lawyers using the same legal logic as presented in *Baldwin* for at least a decade.¹⁵⁷ In fact, three of Lambda Legal's successful efforts in 2014 were cited by the EEOC in *Baldwin*. Recent legal developments following *Baldwin* reflect the strengthened trend away from interpreting Title VII to exclude LGB people from its protections and more toward a growing recognition that sexual orientation discrimination should be covered by the ban on sex discrimination.¹⁵⁸ Most notably, in *Roberts v. UPS, Inc.*, an opinion issued less than two weeks after *Baldwin*, the court cited entire sections of the EEOC's decision in holding that "there was a legally sufficient evidentiary basis to support the jury's verdict that defendant UPS subjected plaintiff to a hostile work environment based on her sexual orientation."¹⁵⁹

CONCLUSION

The benefits of an inclusive workplace that is free from discrimination are clear both socially¹⁶⁰ and economically.¹⁶¹ The combination of *Macy* and *Baldwin* provide courts with a guideline to analyze whether or not the EEOC's interpretation that LGBT discrimination claims fall under the "sex" provision of Title VII is acceptable. These decisions could serve as a significant step toward the recognition of comprehensive protections for LGBT workers under Title VII. This recognition would

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- 157 See, e.g., *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002) ("Sexual orientation harassment is often, if not always, motivated by a desire to enforce heterosexually defined gender norms. In fact, stereotypes about homosexuality are directly related to our stereotype about the proper roles of men and women."); *Koren v. Ohio Bell Tel. Co.*, 894 F. Supp. 2d 1032, 1037 (N.D. Ohio 2012) (holding a man fired for marrying another man "is a claim of discrimination because of sex."); *Boutillier v. Hartford Pub. Sch.*, No. 3:13CV1303 (WWE), 2014 WL 4794527, at *2 (D. Conn. Sept. 25, 2014) (explaining how plaintiff being "subjected to sexual stereotyping during her employment on the basis of her sexual orientation" was actionable as sex discrimination under Title VII because it sets forth "a plausible claim that she was discriminated against based on her non-conforming gender behavior").
- 158 See *Koke v. Baumgardner*, No. 15-CV-9673, 2016 WL 93094, at *2 (S.D.N.Y. Jan. 5, 2016) ("Given the door left ajar by *Simonton* for claims based on 'failure to conform to sex stereotypes,' the EEOC's recent holding that Title VII prohibits discrimination on the basis of sexual orientation, and the lack of a Supreme Court ruling on whether Title VII applies to such claims, I cannot conclude, at least at this stage, that plaintiff's Title VII claim is 'wholly insubstantial and frivolous.'"); *Isaacs v. Felder Serv., LLC*, 143 F. Supp. 3d 1190, 1193 (M.D. Ala. 2015) ("This court agrees instead with the view of the Equal Employment Opportunity Commission that claims of sexual orientation-based discrimination are cognizable under Title VII."). But see *Pittman v. Cook Paper Recycling Corp.*, 478 S.W.3d 479, 483 (Mo. Ct. App. 2015).
- 159 *Roberts v. UPS, Inc.*, 115 F. Supp. 3d 344, 374 (E.D.N.Y. 2015).
- 160 See Mary Ellen Egan, Laura E. Durso, Angeliki Kastanis & Christy Mallory, *Global Diversity & Inclusion: Fostering Innovation Through a Diverse Workforce*, Forbes Insights, July 2011, at 11.
- 161 See M.V. Lee Badgett, *The Business Impact of LGBT-Supportive Workplace Policies*, WILLIAMS INSTITUTE, 1 (2013); Deloitte, *Only Skin Deep? Re-examining the business case for diversity*, DELOITTE POINTE OF VIEW, Sept. 2011, at 7, www.ced.org/pdf/deloitte_only_skin_deep.pdf.

prove to be a better alternative than forcing LGBT employees to leave their employment fates up to the current state-by-state and job-based antidiscrimination legal patchwork. Time will tell if lower courts will disagree with the EEOC's ruling (appeals could eventually land a case the hands of the Supreme Court, where it will interpret the law in a manner more or less protective of employees), or if the lower courts will largely agree with the EEOC, as appears to be the general trend following *Macy*. Lastly, if the courts agree with one another and the EEOC in interpreting sex discrimination provisions to prohibit discrimination on the basis of gender identity or sexual orientation, there could be greater potential that the legislature will successfully pass ENDA.¹⁶² Regardless of the path taken, it is time for LGBT employees to be universally protected from workplace discrimination, and the EEOC decisions have provided a strong platform for such a development to occur.

¹⁶² See Mary Anne Case, *Legal Protections for the "Personal Best" of Each Employee: Title VII's Prohibition on Sex Discrimination, the Legacy of Price Waterhouse, and the Prospect of ENDA*, 66 STAN. L. REV. 1333 (June 2014) (emphasizing that people should have concerns about the limitations on LGBT rights that the provisions of the current version of ENDA might lock into law, such as an extremely broad religious exemption, a concession to sex-specific grooming standards, the absence of a bona fide occupational qualification, preclusion of disparate impact claims and affirmative action, an extremely broad but potentially confusing definition of gender identity, and an absence of explicit protections for many items of concern to the transgender community, including use of pronouns and bathrooms consistent with an individual's gender identity).